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IN THE

Supreme Court of the United States

OCTORER TERM, 1991

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

ROBERT H. BORK
5171 Palisade Lane, N.W.
Washington, D.C. 20016

ARNOLD M. LERMAN
Counsel of Record
GARY B. BORN
MARC R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

KENNETH S. GELLER
MARK I. LEVY
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This is not a "simple contract dispute" between private parties. Brief for Respondent in Opposition at 2, 24 ("Br. in Opp'n"). To begin with, this Court granted certiorari once before because of the severe practical implications of the court of appeals' decision. *See Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990). Now, as then, this case presents issues of profound importance to the bank regulatory system and to the foreign commerce and foreign relations of the United States.

On remand, the Solicitor General advised the court of appeals of the significance of the issues and stated that the United States had reached a concluded position in this case that *"a uniform federal rule is essential to protect federal interests and achieve congressional objectives."* Brief for the United States as *Amicus Curiae* at 22, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991) (No. 87-7685) ("U.S. 2d Cir. Am. Br.

II") (emphasis supplied).[1] In the Solicitor General's view, federal law "establishes a federal rule of decision in this case" that places sovereign risk with the depositor. U.S. 2d Cir. Am. Br. II, at 13. Nonetheless, the court of appeals rendered a decision in direct conflict with the views of the United States.

The New York Clearing House Association and the Institute of International Bankers have filed a brief in support of a grant of certiorari. These *amici*, who represent "divergent economic interests" within the international banking community and most of the principal participants in the international interbank placement market (including depositors with "substantial sums of blocked funds on deposit at Citibank/Manila"), also express grave concern over the decision below.[2] As *amici* explain, the court of appeals' ruling "represents a radical departure from settled law that could cause considerable turmoil in the practice of international banking." (Am. Br. at 3.)[3]

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[1] In his brief on remand, the Solicitor General stated:

> The United States observed in its previous brief to this Court that the federal government's unique interests in regulating the international operations of United States banks may require application of a federal rule of decision in this area. *We found it unnecessary in that brief or in the Supreme Court proceedings to take a concluded position on that issue.* The Supreme Court instructed this Court, however, to consider on remand whether a "federal common law rule" should be applied in this instance. *Our further consideration of the question has convinced us that a uniform federal rule is essential to protect federal interests and achieve congressional objectives.*

U.S. 2d Cir. Am. Br. II, at 22 (emphasis supplied) (citations omitted).

[2] Brief of the New York Clearing House Association and the Institute of International Bankers as *Amici Curiae* in Support of Petitioner at 2-3 ("Am. Br.").

[3] The position of *amici* belies the snippets from the trial record cited by respondent to the effect that Citibank was somehow alone among market participants in its view on allocation of sovereign risk. (Br. in Opp'n at 5.)

Respondent says nothing about the practical consequences of this case. Remarkably, it does not even allude to the federal government's position, much less address the concerns expressed by the Solicitor General.[4] Nor, as we now explain, does it rebut the showing that the decision of the court of appeals misconstrues federal law.

I. THERE IS A CONFLICT BETWEEN STATE AND FEDERAL LAW

Respondent first argues that there is no conflict between New York law and federal law because both permit the parties to agree to allocate sovereign risk. (Br. in Opp'n at 13-14, 20.) Of course, the parties themselves may allocate sovereign risk,[5] but that is not what this case is about. This Court, reversing the court of appeals, has specifically held that there was *no agreement* between the parties on the allocation of sovereign risk. Petition for a Writ of Certiorari App. B at 19a-23a ("Pet."). Having done so, the Court then stated the issue on remand to be whether, *in the absence of such an agreement*, sovereign risk, as a matter of law, is placed on the depositor or on the U.S. bank. (Pet. App. B at 19a, 23a.)

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[4] Respondent's only reference to the government's submission is an extemporaneous statement made at a previous oral argument before this Court (Br. in Opp'n at 11) that respondent later distorts (Br. in Opp'n at 22). As already noted, at the time this case was argued, the government had not yet concluded its position on this issue. U.S. 2d Cir. Am. Br. II, at 22. It now has. Respondent's principal effort to denigrate the federal interests at stake here is based on a single nineteenth century case that involved neither foreign relations nor foreign commerce concerns and predated the Federal Reserve and Federal Deposit Insurance Acts. (Br. in Opp'n at 10 (citing *First Nat'l Bank v Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).)

[5] Respondent does not dispute that the parties operated in a vast international nondocumentary market. It does, however, misstate Citibank's position when it claims that Citibank advocates that "sovereign risk . . . be allocated to foreign-branch depositors *in all deposit contracts under all circumstances*." (Br. in Opp'n at 22.)

Respondent next argues that there can be no federal rule to create a conflict because no statute or regulation "purport[s] to govern the allocation of risk between a bank and its depositors." (Br. in Opp'n at 13.) But as we explained in the petition, and as the Solicitor General and all of the federal agencies agree, federal statutes and regulations distinguishing foreign branch and domestic deposits long have embodied a baseline rule that the foreign branch depositor bears the sovereign risk. For decades, the federal bank regulators have acted in accordance with this rule, and federal statute has specifically preserved the distinctions between foreign and domestic deposits. (Pet. at 11-14.) Even the court of appeals recognized the existence of a federal standard (Pet. App. A at 9a-10a), but gave it the wrong content by wholly misreading 12 C.F.R. § 204.2(t) (1991). (Pet. at 13-19.)

Nothing in respondent's analysis of Section 204.2(t) (Br. in Opp'n at 18-19) salvages the court of appeals' strange reading of this regulation. Respondent concedes that Section 204.2(t) preempts state law for deposits of U.S. residents under $100,000 because, no matter what the deposit agreements state with respect to allocation of sovereign risk, the deposits will not be considered foreign deposits. Respondent then argues that, for all other deposits, Section 204.2(t) provides that the parties are free to agree to allocate sovereign risk. But all this means is that Section 204.2(t) tells us nothing about the applicable federal law where—as here, and in virtually all interbank Eurodollar placements—there is no such agreement. It is a different Federal Reserve Board regulation—12 C.F.R. § 204.128(c) (1991)—that deals with this circumstance.[6]

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[6] Respondent's arguments (Br. in Opp'n at 19) that the language of Section 204.2(t) was taken in part from the predecessor of Section 204.128(c), and that Federal Reserve Board interpretations of Section 204.128(c) refer to Section 204.2(t), do not address the meaning of this language; they merely restate the position previously taken by respondent that Section 204.2(t) "simply para-

Therefore, respondent must ultimately confront Section 204.128(c) which states that a foreign branch depositor "assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." Respondent (Br. in Opp'n at 20-21) dismisses this provision by arguing that: (1) it expresses "principles of state contract law;" (2) it applies only to restrictions that are tantamount to expropriation because analogous state law purportedly does so; and (3) both lower courts held that the Philippine government did not, in effect, expropriate respondent's deposits. For these reasons, according to respondent, there is no conflict between New York law and Section 204.128(c).

The argument that Section 204.128(c) is grounded in state law is nonsense. The regulation itself neither says nor implies that the term "restrictions on withdrawals" be interpreted by reference to state law, and the Federal Reserve Board, the federal agency that promulgated Section 204.128(c), believes that it establishes a set of federal standards. U.S. 2d Cir. Am. Br. II, at 18-21. Certainly, the Philippine law created "restrictions on withdrawals" within the plain meaning of these words.[7] Section 204.128(c) nowhere suggests that "restrictions on

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phrases" the Federal Reserve Act. Brief for Respondent at 37, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990) (No. 88-1260).

[7] To claim, as respondent does (Br. in Opp'n at 10, 21) that the lower courts "held that the Philippine government had not imposed any . . . 'restrictions on withdrawal' " contradicts the actual holdings. In fact, the district court's opinion explicitly declined to reach the issue whether, under New York law, the Philippine government's actions were tantamount to expropriation—much less construe the term "restrictions on withdrawals" in Section 204.128(c) —and decided the case solely on another ground. (Pet. App. E at 45a-46a.) The court of appeals merely quoted the district court decision on this point, without providing any elaboration. (Pet. App. A at 8a-9a.) Whether or not New York law would view the Philippine government's actions as the equivalent of expropriation has no relevance to the meaning of Section 204.128(c).

withdrawals" is limited to expropriations, nor has it ever been so construed.[8]

Respondent's own reading of the federal statutes, regulations and policies demonstrates precisely why this case presents a significant question of federal banking law. Throughout its brief, respondent argues that 12 C.F.R. § 204.2(t), 12 C.F.R. § 204.128(c), and other provisions of federal law do not have the meaning ascribed to them by Citibank, the Solicitor General, the responsible federal agencies, and the international banking community. There is an urgent need for an answer to the federal law question presented here. It is time for the matter to be settled conclusively.

II. RESPONDENT'S ARGUMENTS CANNOT HIDE THE IMPORTANT ISSUE OF FEDERAL LAW

Respondent argues that certain state law issues are "independently dispositive" of this case. (Br. in Opp'n at 28.) It claims that "Citibank would still remain liable here because it never even sought permission to repay [respondent]," and that "Citibank does not claim . . . it sought permission to repay its deposits with Philippine assets." (Br. in Opp'n at 25-26.) But this is just the opposite of what the district court found; the district court squarely held that Citibank did all that was required of it with respect to Citibank/Manila's Philippine *and* non-Philippine assets. (Pet. App. E at 46a-47a.) That finding has not been disturbed.

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[8] Respondent's suggestion (Br. in Opp'n at 17 n.10) that this provision was not continuously part of the Code of Federal Regulations is nonsense as well. Section 204.128(c) was never repealed by the Federal Reserve Board, as its subsequent republication in the Code makes clear, and it was continuously published in the Federal Reserve Regulatory Service (a Federal Reserve Board publication of applicable regulations and opinions). Its principle was also reiterated in Staff Opinions of the Federal Reserve Board in 1982 and 1983. 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Op., Feb. 23, 1982); *id.* at ¶ 2-330.1 (Staff Op., July 29, 1983).

The district court did say that Citibank had not sought the Philippine government's permission to repay respondent out of its *U.S. assets*. But, as this Court made clear in its reversal of the court of appeals, the issue here is not whether Philippine laws "bar the collection of [respondent's] deposits from the general assets of the Citibank in the State of New York" but "rather, is whether Citibank is obligated to allow collection in New York." (Pet. App. B at 19a.) Whether Citibank could repay respondent's deposits with its U.S. assets (with or without Philippine government approval) has no bearing on whether Citibank is *obligated* to do so under applicable law.

Respondent tries to raise the same issue in another context by what it calls the "embarrassing" fact that Citibank engaged in a "secret scheme of profit repatriation" instead of repaying respondent. (Br. in Opp'n at 6, 9, 27.) Respondent's charges are intemperate and irresponsible and have no place here.[9] There was nothing secret about Citibank/Manila's repatriation of profits; it occurred in accordance with published decrees that clearly articulated Philippine law, and respondent concedes that information disclosing the repatriation was always contained in Citibank/Manila's public filings with the Philippine Securities and Exchange Commission. (Br. in Opp'n at 6 n.6.)

The Philippine law that forbids Citibank/Manila from repaying the principal of respondent's deposits expressly authorizes it to pay respondent (and similarly situated depositors) interest on these deposits. Analogously, Philippine law prohibits businesses like Citibank/Manila from

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[9] It is difficult to understand why respondent waited more than six years after it filed this case and until after full briefing on remand to raise this issue. Contrary to respondent's charge (Br. in Opp'n at 5-6) nothing in the statements cited by respondent suggests that Citibank made any misrepresentation concerning the effect of Philippine law.

repatriating their capital but permits remittance of some profits. The Philippine law reflects the Philippines' national policies relating to the use of scarce foreign exchange. Even if Citibank/Manila had remitted no profits during the relevant period, it still would not have been permitted by the applicable Philippine decrees to repay the principal of respondent's deposits.[10]

Neither these arguments nor others raised by respondent deal with the central issue in this case. That issue—defined by this Court for the court of appeals—is: in the absence of an agreement on who should bear sovereign risk, what law should govern and what is the content of that law? (Pet. App. B at 24a.) Respondent repeatedly skirts this issue by saying that the parties are free to contract as they wish and by referring to so-called independent grounds for decision. Respondent also says that the case should be settled by Congress because recent legislation, whose principal purpose and effect was to recapitalize the bank insurance fund, might have included a provision (one of hundreds that never found its way into this year's banking legislation) that would have allocated sovereign risk to the depositor.[11] Or, respondent contends that the case should be left to the Executive Branch because this Court is ill-equipped to balance the policy considerations and international implications inherent in allocating sovereign risk. (Br. in Opp'n at 23.) Of course, the position of the executive departments was

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[10] In any event, contrary to respondent's assertions that the court of appeals' paragraph of *dicta* on remittances was "independently dispositive," the court specifically declined to reach the issue raised by respondent. (Br. in Opp'n at 27-28.) In fact, in a sentence carefully cropped by respondent from its quotation of the paragraph, the court of appeals expressly stated, "[w]e need not resolve this question." (Pet. App. A at 11a.)

[11] This Court has declared its reluctance "to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

rejected—indeed, was totally ignored—by the court of appeals.

This type of argument neither props up the court of appeals' erroneous decision nor dispels the importance of this case. The court of appeals adopted a rule of decision in direct conflict with the rule of federal law presented to it by the Solicitor General. Its decision is highly damaging and wrong. The reasons for granting certiorari at this juncture are even more compelling than those that previously persuaded the Court to hear this case. Accordingly, Citibank's petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. BORK
5171 Palisade Lane, N.W.
Washington, D.C. 20016

ARNOLD M. LERMAN
Counsel of Record
GARY B. BORN
MARC R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

KENNETH S. GELLER
MARK I. LEVY
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for Petitioner

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